IN THE HIGH COURT OF JUDICATURE AT BOMBY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 4447 OF 2006

Mr. Pawan Kumar S/o.
Satyanarayan Goenka ....Applicant.

V/s

The State of Maharashtra ....Respondent.

Mr. K.T.S. Tulsi with Ms. Sashe Vani, Mr. S.K. Chaurasia, Mr. Priytosh Tiwari i/b Mr. A.M. Sarogi for the applicant.

Mr. Raja Thakare, Spl. P.P. for the State.

CORAM: V.M. KANADE, J.
DATE : 9th February, 2007

P.C.

1. Heard the learned Senior Counsel appearing on behalf of the applicant and the learned Special Public Prosecutor for the respondent.

2. This is a second application for bail on merits which has been filed by the applicant. His first application for bail was rejected by this Court by order dated 3/5/2006 in Criminal Application No. 910 of 2006 on merits. Thereafter, the

applicant applied for interim bail to undergo bypass surgery, which was granted by this Court and a temporary bail for a period of three months was granted to the present applicant during which period he did undergo bypass surgery at Bombay Hospital. Thereafter, an application was made for extension of time to surrender which, eventually, was rejected. Against the said order, S.L.P was preferred by the applicant and the following order was passed:-

"Upon hearing counsel the court made following

O R D E R

Heard learned senior counsel appearing on behalf of the petitioner.

We have perused the orders passed by the High Court of Bombay dt. 03.05.2006 in Criminal Application No. 910 of 2006 and order dated 16.11.2006 in Criminal Application No. 807 of 2006. By order dated 03.05.2006 in Criminal Application No. 910 of 2006, after considering the rival submissions, the High Court dismissed the application for grant of bail to the petitioner herein. Thereafter, the petitioner was

granted interim bail for three months to undergo bye-pass surgery. It is now stated that the bye-pass surgery is over. An application for extension was made in Criminal Application No. 807 of 2006. It is stated by the learned senior counsel that the said application was disposed of by the High Court on the ground that the petitioner is recuperating at home and, therefore, he was directed to surrender on 01.12.2006. The High Court further made it clear that no further extension will be granted.

We have heard the learned senior counsel for the petitioner. At the time of hearing, a medical certificate issued by the Bombay Hospital dt. 30.10.2006 was placed before us. It is stated before us that the said medical certificate issued by the Bombay Hospital was placed before the High Court. But, however, the High Court has not considered the said certificate in the reasons adduced for not extending the interim bail beyond 01.12.2006. it is also brought to our notice that the investigation is over and that the chargesheet has already been filed and the other accused has also been released on bail by the Court.

> We, therefore, keeping in view the peculiar facts and circumstances of this case and the medical certificate issued by the Bombay Hospital now permit the petitioner to surrender before the Court by 13.12.2006 and also move a fresh application for bail before the High Court. We request the High Court to dispose of the fresh application for bail, if filed, on merits and in accordance with law before 25.12.2006.
>
> We also make it clear that we are not expressing any opinion on the merit of the claim made by the petitioner.
>
> Crl. M.P. No. 13915/2006 is disposed of accordingly.
>
> Copy of the order be given dasti."

Thereafter, again, this present fresh application for bail has been filed by the present applicant pursuant to the liberty granted by the Apex Court in its order dated 11/12/2006. The Apex Court has also further directed by the said order to decide the fresh application for bail on merits. Thereafter,

the applicant again approached the Supreme Court for the purpose of obtaining clarification of its earlier order dated 11/12/2006 in view of the order passed by this Court and the Apex Court has, thereafter, passed the following order on 22/1/2007.

> "Upon hearing counsel the court made following
>
> O R D E R
>
> Heard counsel for the petitioner.
>
> We have perused the order passed by this Court on 11th December, 2006 and the Order passed by the High Court on 3rd January, 2007.
>
> We do not consider it necessary to clarify this Court's Order of 11th December, 2006 since the order speaks for itself. It is open to the High Court to pass such order as it deems proper in the facts and circumstances of the case having regard to the observation of this Court highlighting the

peculiar facts and circumstances of this case.

With these observations Crl. M.P. No.285 of 2007 in Crl.M.P. No. 13915 of 2006 is dismissed.

Copy of the order be given dasti"

3. Mr. Tulsi, the learned Senior Counsel has submitted that even this Court, while rejecting the application for bail by order dated 3/5/2006, had granted liberty to the applicant to apply for bail again if trail is not concluded within a period of one year. He also submitted that pursuant to the directions which were given by Division Bench of this Court in a Writ Petition which has been filed by the husband of the deceased, Division Bench has permitted the prosecution to carry out further investigation and a direction has been given to the trial court to wait till the said investigation is over. He further submitted that in the said Writ Petition which has been filed in this Court, the prosecution has given its consent for the purpose of staying the trial. He also invited my attention to the medical certificate which has been issued by

the Bombay Hospital in which it is mentioned that the applicant had undergone bypass surgery on 2/10/2006 and was discharged on 12/10/2006 and that he was doing well on drugs but complaints of weakness and breathlessness on exertion. It was also mentioned therein that he has long standing chronic obstructive lung disease which make him more weak and breathless. In medical certificate which is annexed to the Petition and which is issued by Dr. Eric Borges, Cardiologist and Physician attached to the Bombay Hospital, it is stated that the applicant is suffering from Asthma, High Blood Pressure and Coronary Artery Diseases. The learned Senior Counsel submitted that the applicant, therefore, was entitled to be released on medical grounds. He submitted that the Apex Court also has directed this Court to consider the application afresh taking into consideration peculiar facts and circumstances of the case. He submitted that peculiar facts and circumstances were that the applicant had undergone a bypass surgery and was recuperating though he is still continued to have other problems which are mentioned in the medical certificates. He submitted that the applicant is not likely to abscond and

stringent conditions may be imposed to release the applicant on medical grounds.

4. The learned Senior Counsel further submitted on merits of the case that no other material of conspiracy was available other than the confession of Mr. Parab, which was recorded under section 164 of the Criminal Procedure Code. He submitted that there were catena of judgments of the Supreme Court and Privy Council wherein it had been held that such an evidence was inadmissible, particularly in view of the provisions of section 10 of the Indian Evidence Act. He invited my attention to the judgment of the Apex Court in the case of Jayendra Saraswathi Swamigal Vs. State of T.N. reported in **(2005) 2 SCC 13** and particularly paragraphs 12 and 13 of the said judgment wherein the Supreme Court had referred to the judgment in the case of *Mirza Akbar v. King Emperor* reported in AIR 1940 PC 176. He submitted that, in the present case also, Mr. Parab, who was initially arraigned as an accused, was released on bail and thereafter his confessional statement was recorded almost after a period of two years after the date of incident. He submitted that that

the true import of section 10 was that a statement which was made during the course of conspiracy would alone fall within the purview of section 10, whereas, in the present case, confessional statement had been recorded almost after two years after the incident had taken place. He submitted that if this confessional statement is not considered in view of its inadmissibility, there is no other material available and, therefore, on merits, the applicant was entitled to be released on bail as there is a clearly possibility of the applicant being acquitted at the end of the trial. He further submitted that the case of alibi had been pleaded by the applicant in his application which was filed in the Sessions Court and the Sessions Court as also this Court in its earlier order dated 3/5/2005 has rejected the plea of alibi on the ground that such a plea would not be taken into consideration at the time of deciding the question of grant of bail. He invited my attention to the BPL mobile telephone bill between the period 07/08/2003-06/09/2003 and particularly Roaming SMS Calls : Fascel, India Gujarat incoming calls dated 22/8/2003 and Hexacom, India -Rajasthan outgoing calls dated 23/8/2003. He submitted

that this bill clearly indicated that the applicant was at Gujarat on 22/8/2003 and on the morning of 23/8/2003, he was at Rajasthan, traveling in train and, therefore, prima faice, there was sufficient material to indicate that he was not present at the scene of offence. He also invited my attention to air-ticket which was booked for the applicant and his family members one month in advance. He further submitted that the Sessions Court had accepted plea of alibi in the case of other co-accused but for the plea of alibi of the applicant and the application for cancellation of bail which was preferred by the State in this Court was rejected and this Court also in the said application in terms accepted the plea of alibi. He also invited my attention to the case of Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonkar and another reported in **AIR 1960 SC 1113** wherein, he pointed out that the Apex Court has clearly held that the Magistrate was duty bound to consider the plea of alibi during inquiry which was conducted under sections 202 and 203 of the Criminal Procedure Code. The learned Senior Counsel further submitted that even the aspect of recovery of bag on which reliance was placed by the prosecution in the charge-sheet

itself was unreliable in view of the clear contradiction which was apparent from the statement of the witnesses which in clear terms stated to the contrary to what was mentioned in the recovery panchanama. He further submitted that recovery of bag could be assailed firstly on the ground that it was made nearly after 13 days after the applicant was arrested. Secondly, there was no independent witness who had signed the recovery panchanama and, lastly, no person from the neighbourhood was examined as panch witness.

5. Mr. Thakare, the learned Special Public Prosecutor appearing on behalf of the prosecution invited my attention to the earlier order which was passed by this Court. He submitted that so far as the question of grant of bail on medical grounds was concerned, this Court had, in number of cases, rejected such bail applications. He submitted that the certificates on which the reliance is placed by the applicant did not indicate that the applicant was seriously ill and that there was danger to his life. He submitted that adequate facility was available at the jail hospital and, there, treatment could be given to the applicant. He further invited

my attention to the order passed by the Division Bench of this Court in the Petition filed by the husband of the deceased wherein directions were issued by this Court to the trial court to permit the prosecution to carry out further investigation in Canada. He invited my attention to the report which has been submitted by Ontario, Ministry of Community Safety and Correctional Services. He submitted that several tests were conducted which clearly indicated that the applicant was present at the time when the incident had taken place and had, in fact, participated in assaulting the deceased. He submitted that, so far, additional charge-sheet has not been filed and it was likely to be filed in short time. He submitted that in view of this additional evidence, no case for bail is made out. He submitted that the watchman of the building where incident had taken place had seen the present applicant at the time of the incident when he entered the building and also when he left the building alongwith other accused. He submitted that the statement of Mr. Parab was sufficiently corroborated by other statements of other witnesses and, therefore, it was not correct to say that apart from confessional statement of

Mr. Parab, there was no material on record against the present applicant. On the question of alibi, he submitted that it was possible for any person to carry mobile phone and there was no manner of knowing from the mobile telephone bills whether the mobile phone was carried by its owner or by some other person. He submitted that therefore a plea of alibi should not be decided at this stage.

6. I have given my anxious consideration to the submissions made by the learned Senior Counsel appearing on behalf of the applicant and the learned Special Public Prosecutor appearing on behalf of the respondent. In my view, it is not possible to accept the submissions made by the learned Senior Counsel appearing on behalf of the applicant so far as the merits of the case are concerned. On the earlier occasion also, I had minutely gone through the entire chargesheet and the statements of witnesses and I felt it was not proper, at this stage, to give my reasons on the merits of the case as there is always a possibility that the Sessions court may be influenced by any observations made by this Court and, therefore, in the earlier order also, I had

not given detailed reasons on merits and I had indicated that there was sufficient material on record to indicate the involvement of the present applicant. In the judgment in the case of Jayendra Saraswathi Swamigal (supra) on which reliance has been placed by the learned Senior Counsel appearing on behalf of the applicant, the Apex Court in para 13 has observed as under:-

> "13. Here, the confessions of A-2 and A-4 were recorded long after the murder when the conspiracy had culminated and, therefore, Section 10 of the Evidence Act cannot be pressed into service. However, we do not feel the necessity of expressing a concluded opinion on this question in the present case as the matter relates to grant of bail only and the question may be examined more deeply at the appropriate stage."

In my view, therefore, at this stage, it is not possible to give a conclusive finding on the legal aspect of the admissibility of the confessional statement under section 164. So far as

the other material is concerned, as indicated above, there is sufficient material in my view, apart from the confessional statement.

7. On the question of alibi, it is no doubt true that there cannot be a general rule that plea of alibi cannot and should not be considered at the stage of grant of bail and if material on record is available which prima facie creates a doubt in the mind of the Court that a plea of alibi may be correct, in such circumstances the Court can very well consider such material. In the present case, as rightly pointed out by the learned Special Public Prosecutor appearing on behalf of the prosecution, that the reliance on mobile telephone bills was also not sufficient to indicate that the mobile phone was carried by the owner of the mobile phone. So far as the judgment in the case of Vadilal Panchal (supra) on which reliance has been placed by the learned Senior Counsel Mr. Tulsi is concerned, in my view, the Supreme Court has made observations while construing the provisions of sections 202 and 203 of the Criminal Procedure Code and the ratio of the said judgment would not apply to the facts of the present

case. In any event, as observed by me earlier, there cannot be a general rule of not considering the plea of alibi at the stage of granting bail.

8. So far as the question of grant of bail on medical ground is concerned, in my view, taking into consideration the peculiar facts and circumstances and considering the age of the accused and the nature of ailment, he would be entitled to be released on bail on medical grounds subject to stringent conditions being imposed. It is an admitted position that the applicant has already undergone a bypass surgery and he is recuperating at the moment. A petition has been filed in this Court wherein directions have been given by the Division Bench of this Court to the trial court to wait till additional investigation is over. The trail, therefore, is not likely to begin in the near future. It is quite well settled that while considering the question of grant of bail, medical condition of the applicant also has to be kept in mind because it is essential to ensure that the applicant does not succumb to his illness while he is in jail and thereby he is prevented from facing the trial because, ultimately,

what is at stake is the inquiry into the truthfulness or otherwise of the charges which are leveled against the accused. Mere filing of the chargesheet alone is not sufficient for the purpose of coming to the conclusion that the accused is guilty as claimed by the prosecution.

9. The applicant, therefore, is released on bail in the sum of Rs 50,000/- with one or two sureties in the like amount on the following conditions:-

(i) Applicant shall report to DCB, CID, Unit-II, Mumbai every Friday evening at 5.00 P.M and Monday morning at 11.00 A.M.

(ii) Applicant shall not leave City of Mumbai without seeking prior permission of DCB, CID, Unit-II, Mumbai.

(iii) The pass-port of the applicant is already surrendered to the Investigating Officer. Applicant shall not travel abroad without seeking prior permission from this Court.

(iv) It is further made clear that the applicant shall not directly or indirectly tamper with the evidence or threaten any prosecution witnesses and if any complaint is received by the Investigating Officer, liberty is granted to the prosecution to apply for cancellation of bail.

10. Application is disposed of in the above terms.

V.M. KANADE, J.